

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANA-BORGER GRECO	:	
Administratrix of the Estate of	:	
JOSE GRECO, Deceased	:	CIVIL ACTION
	:	
v.	:	NO. 02-CV-6862
	:	
THE NATIONAL RAILROAD	:	
PASSENGER CORPORATION	:	
(AMTRAK), ET AL	:	

**SURRICK, J.**

**DECEMBER 30, 2005**

**MEMORANDUM & ORDER**

Presently before the Court is Plaintiff's Motion For The Entry Of Judgment (Doc. No. 69). For the following reasons, Plaintiff's Motion will be denied.

**I. BACKGROUND**

The facts in this case have been sufficiently summarized in our Memorandum and Order dated June 1, 2005. The facts pertinent to the instant Motion are as follows. On September 18, 2000, Jose Greco was a passenger on an Amtrak train. Greco was observed lying across two seats on the train. When another passenger asked him to sit up so she could use one of the seats, Greco refused. Alex Baldwin, an Amtrak conductor, tried unsuccessfully to persuade Greco to relinquish the seat. Baldwin requested the assistance of Amtrak police. Officers Richard P. Drury and Kevin Molloy met the train at the Trenton, New Jersey train station. After being apprised of the situation by Baldwin, the officers confronted Greco. Greco became argumentative and would not move. Drury decided to arrest Greco and to physically remove him from the train. As Drury and Greco exited the train, Greco was injured. Defendants contend that

Greco and Drury stumbled and fell off the train. Plaintiff contends that Greco was thrown from the train to the train platform by Drury.<sup>1</sup>

Plaintiff brought this action on behalf of her deceased husband, Jose Greco, against Defendants on the following theories of liability: violations of 42 U.S.C. § 1983, false arrest, false imprisonment, malicious prosecution, assault and battery, civil conspiracy, breach of contract, wrongful death, survival action, and loss of consortium. Plaintiff alleged that Greco was mistreated by Defendants Baldwin, Molloy, and Drury while he was a passenger on the Amtrak train. Plaintiff further alleged that these Defendants caused injury to Greco's toe which was sustained when he was thrown from the train, and which ultimately lead to his death some months later.

The case went to trial before a jury beginning on June 6, 2005. On June 17, 2005, the jury was instructed with regard to the law. At that time, the jury was given a Verdict form that contained Special Interrogatories. (Verdict Sheet, Doc. No. 54.) The questions on the Verdict form were as follows:

Question 1a. Did Amtrak Police Officer Richard Drury use excessive force against Jose Greco in violation of 42 U.S.C. § 1983?

Yes \_\_\_\_ No \_\_\_\_

Question 1b. Did Amtrak Police Officer Richard Drury falsely arrest Jose Greco in violation of 42 U.S.C. § 1983?

Yes \_\_\_\_ No \_\_\_\_

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<sup>1</sup> At the time of trial, Jose Greco was dead. Plaintiff essentially established liability through the testimony of Greco's psychologist, Dr. Bruce C. Wittmaier, who testified as to what Greco had told him about the incident as part of the treatment that Greco received for depression, allegedly resulting from the incident. (*See* June 1, 2005 Mem. & Order, Doc. No. 34.)

Question 1c. Did the violation of 42 U.S.C. § 1983 by Officer Richard Drury cause injury to Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 2a. Did Amtrak Police Officer Kevin Molloy use excessive force against Jose Greco in violation of 42 U.S.C. § 1983?

Yes \_\_\_\_ No \_\_\_\_

Question 2b. Did Amtrak Police Officer Kevin Molloy falsely arrest Jose Greco in violation of 42 U.S.C. § 1983?

Yes \_\_\_\_ No \_\_\_\_

Question 2c. Did the violation of 42 U.S.C. § 1983 by Officer Kevin Molloy cause injury to Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 3a. Did Amtrak Conductor Alex Baldwin violate 42 U.S.C. § 1983 by providing information to Amtrak Police Officer Richard Drury or Amtrak Police Officer Kevin Molloy which led to either the false arrest of Jose Greco or the use of excessive force against Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 3b. Did the violation of 42 U.S.C. § 1983 by Conductor Alex Baldwin cause injury to Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 4a. Did Defendant Amtrak violate 42 U.S.C. § 1983 by failing to train, discipline, or control Amtrak Police Officer Richard Drury in gross disregard of the rights of Jose Greco or with deliberate indifference to the rights of Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 4b. Did the violation of 42 U.S.C. § 1983 by Amtrak cause injury to Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 5a. Did Officer Drury arrest Jose Greco without probable cause or commit assault and battery against him in violation of New Jersey law?

Yes \_\_\_\_ No \_\_\_\_

Question 5b. Did Officer Drury's violation of the law of the State of New Jersey cause injury to Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 6a. Did Officer Molloy arrest Jose Greco without probable cause or commit assault and battery against him in violation of New Jersey law?

Yes \_\_\_\_ No \_\_\_\_

Question 6b. Did Officer Molloy's violation of the law of the State of New Jersey cause injury to Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

Question 7. Was a violation of 42 U.S.C. § 1983 or a violation of the law of the State of New Jersey related to false arrest or assault and battery the proximate cause of the death of Jose Greco?

Yes \_\_\_\_ No \_\_\_\_

(Doc. No. 54.) Questions 8, 9, and 10 dealt with the type and amount of damages that the jury could award if a Defendant was found liable.<sup>2</sup> (*Id.*) There were no objections to the Verdict form and there were no objections to the Court's instructions.

The jury deliberated for several hours on June 17, 2005, and for most of the day on June 20, 2005. After further deliberation on June 21, 2005, the foreperson advised the Court that the jury had answered all of the questions on the Verdict form for which they could reach a unanimous agreement. (June 21, 2005 Tr. at 3.) The foreperson further stated that the jury was unable to reach a unanimous agreement on two questions and on the issues related to damages. (*Id.*) Even after several hours of further deliberation, the jury was unable to achieve a unanimous decision on these matters. (*Id.* at 6.) The foreperson signed and submitted the incomplete Verdict form to the Court. (*Id.* at 6-7; Doc. No. 54.) The verdict was not read or recorded in

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<sup>2</sup> Special Interrogatories were also submitted to the jury to be answered if the jury answered "yes" to Questions 1c, 2c, or 3b. These interrogatories were designed to determine the factual basis for the jury's findings on Questions 1c, 2c, or 3b for the purpose of aiding the Court in deciding whether a Defendant was entitled to qualified immunity. The jury answered 14 of the 18 interrogatories and the foreperson signed and dated this Interrogatory form.

open court, nor was the jury polled by either party. The Court discharged the jury as deadlocked on June 21, 2005. (June 21, 2005 Tr. at 10.)

According to the Verdict form, the jury could not unanimously agree on Questions 4a, 4b, 7, 8, 9, and 10. (Doc. No. 54.) However, the signed Verdict form did indicate that the jury agreed that Defendant Richard Drury used excessive force which caused injury to Jose Greco, and that Defendant Drury had committed assault and battery on Greco in violation of New Jersey law, which caused him injury. (*Id.* at 1-3.) The signed Verdict form further indicated that the jury agreed that Defendants Molloy and Baldwin did not violate § 1983 and that Defendant Molloy did not arrest Greco without probable cause or commit assault and battery on Greco in violation of New Jersey law. (*Id.*)

A retrial has been scheduled for January 30, 2006. Relying on the signed Verdict form, Plaintiff has moved for entry of judgment on certain claims. Plaintiff requests that judgment be entered in her favor on Verdict form Questions 1a and 1b, finding that Defendant Drury caused injury to Jose Greco by use of excessive force in violation of § 1983, and on Questions 5a and 5b, finding that Defendant Drury caused injury to Jose Greco by assault and battery in violation of New Jersey law. (Doc. No. 69 at 5.) Plaintiff also requests that judgment be entered in favor

of Defendants Molloy and Baldwin. (*Id.*) Defendants oppose the entry of any judgment, including judgments in favor of Defendants Malloy and Baldwin.<sup>3</sup>

## **II. LEGAL ANALYSIS**

### **A. Judgment Based on the Signed Verdict Sheet**

The Court submitted the Verdict form that contained interrogatories to the jury pursuant to Federal Rule of Civil Procedure 49. *See* Fed. R. Civ. P. 49(b) (“The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.”). Plaintiff contends that, pursuant to Rule 58, the Court is authorized to enter an appropriate judgment on the special verdict of the jury in conformity with the jury’s findings, if the jury finds the facts on the controlling issues and there is no contradictory finding. (Doc. No. 69 at 3.)

Unless the parties stipulate otherwise, the verdict of a civil jury must be unanimous. Fed. R. Civ. P. 48. In order for a jury’s verdict to be considered valid, the verdict must be read in open court and must be recorded by the court. *See Finn v. Carnegie-Illinois Steel Corp.*, 68 F. Supp. 423, 435 (W.D. Pa. 1946) (“[T]he verdict as recorded by the jury in open court is the verdict of the jury . . . .”); *Fox v. United States*, 417 F.2d 84, 89 n.5 (5th Cir. 1969) (in a civil case, “[t]he only verdict is that which is returned and announced in open court as the verdict of the jury”). The verdict in this case was not read in open court. The foreperson did acknowledge

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<sup>3</sup> At the close of Plaintiff’s case and after all of the evidence had be presented, counsel for Defendants moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. (June 17, 2005 Trial Tr. at 12, 188-92.) Defendants’ counsel argued that there was insufficient evidence to support a verdict against either Baldwin or Molloy. (*Id.*) Inexplicably, Defendants’ counsel now chooses to object to the entry of judgment in favor of his clients Defendants Baldwin and Malloy. In other words, counsel has chosen to put his clients at risk in a second trial notwithstanding Plaintiff’s request that judgment be entered in their favor.

during the colloquy with the Court that the Verdict form he had signed and submitted to the Court reflected the unanimous findings of the jury for those questions on which they were able to reach an agreement. However, the jury was not polled to confirm that the answers on the Verdict form were accurate.

Unlike jury polling in criminal trials, the right to jury polling in civil trials is not codified in the Federal Rules of Civil Procedure. *See Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 632 n.1 (1st Cir. 1990). Although the Third Circuit has not ruled on whether such a right exists in a civil action, *Kazan v. Wolinski*, 721 F.2d 911, 916 n.5 (3d Cir. 1983), it is a well-accepted practice to permit such polling upon the request of one of the parties. *See Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 958-59 (1st Cir. 1986); Wright & Miller, Federal Practice & Procedure § 2504 (2005).

In this case, there is no independent verification that the foreperson's statement regarding the jury's vote on the interrogatories was accurate. Moreover, the signed Verdict form was not read in open court and was not recorded by the Clerk. Under the circumstances, we are compelled to conclude that it would be inappropriate to enter judgment for either party on any of the claims based solely on this Verdict form and the brief statement of the foreperson. *Cf. Weiser v. Chrysler Motors Corp.*, 69 F.R.D. 97, 101 n.2 (E.D.N.Y. 1975) (jury's note indicating vote on verdict coupled with colloquy in court "might well be deemed a theoretically sufficient verdict. . . . any requirement of a publicly-stated verdict seems to have been met, at least in spirit, if not technically so"). Accordingly, Plaintiff's Motion will be denied.

## **B. Entry of Judgment as a Matter of Law**

Federal Rule of Civil Procedure 50 provides that a court may determine an issue against a party “[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . .” Fed. R. Civ. P. 50(a)(1). Although courts may grant judgment as a matter of law sua sponte, *see, e.g., Curry v. ENSCO Offshore Co.*, 54 Fed. App’x. 407 (5th Cir. 2002); *Am. & Foreign Ins. Co. v. Bolt*, 106 F.3d. 155, 159 (6th Cir. 1997); *Norton v. Snapper Power Equip.*, 806 F.2d 1545, 1547 (11th Cir. 1987), courts do not usually grant judgment as a matter of law or enter a directed verdict at this stage of a case. *See Wall v. United States*, 592 F.2d 154, 159 (3d Cir. 1979). However, the present case is unique in that Plaintiff has moved for entry of judgment *in favor of* Defendants Molloy and Baldwin, and Defendant moved for entry of judgment twice during the trial as to these Defendants. We perceive no risk of prejudice to either Plaintiff or Defendant in considering the sua sponte entry of judgment in favor of Molloy and Baldwin.<sup>4</sup> *See Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434, 439 (7th Cir. 1957) (where defendant failed to present to the court a post-verdict motion for judgment, district court “was not precluded from entering judgment for defendant on the basis of its allowed motion for directed verdict” since “plaintiff’s procedural rights were not prejudiced by the action of the trial court”); *cf. Crawford v. Andrew Sys., Inc.*, 39 F.3d 1151, 1154 (11th Cir. 1994) (reversing district court’s sua sponte directed verdict where defendant had never made such a motion because plaintiffs “had no notice of, and

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<sup>4</sup> Rule 50(b) states that “[i]f, for any reason, the court does not *grant* a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion.” Fed. R. Civ. P. 50(b) (emphasis added).



thus no opportunity to address or cure, possible insufficiencies in the evidence”); *Wall*, 592 F.2d at 160 (the spirit of the Federal Rules of Civil Procedure, including Rule 50, “suggests avoidance of surprises and tactical victories at the expense of substantive efforts”). Moreover, other courts have entered judgment as a matter of law after the jury failed to return a verdict. *See Stewart v. Walbridge, Aldinger Co.*, 882 F. Supp. 1441, 1443 (D. Del. 1995). In addition, Federal Rule of Civil Procedure 59(a) expressly authorizes a new trial on all or part of the issues. *Friedrich v. U.S. Computer Sys.*, No. 90-1615, 1996 WL 328888, at \*2 (E.D. Pa. Jan. 22, 1996). A court may award a partial new trial on discrete issues when it is “fair under the circumstances.” *Id.* (citing *Mazer v. Lipschutz*, 327 F.2d 42, 52 (3d Cir. 1964)).

When considering judgment as a matter of law, “[t]he question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.” *Foster v. Nat’l Fuel Gas Co.*, 316 F.3d 424, 428 (3d Cir. 2003) (quoting *Patzig v. O’Neil*, 577 F.2d 841, 846 (3d Cir. 1978)). Judgment should only be granted if “the record is critically deficient of [a] minimum quantity of evidence from which a jury might reasonably afford relief.” *Raiczuk v. Ocean County Veterinary Hosp.*, 377 F.3d 266, 269 (3d Cir. 2004) (quoting *Powell v. J.T. Posey Co.*, 766 F.2d 131, 133-34 (3d Cir. 1985)). The court “may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury’s version.” *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993) (citing *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 190 (3d Cir. 1992)).

1. Defendant Molloy

Plaintiff brings a claim against Defendant Kevin Molloy, an Amtrak police officer, under 42 U.S.C. § 1983, which provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Section 1983 does not create substantive rights. *Doe v. Delie*, 257 F.3d 309, 314 (3d Cir. 2001). Rather, it provides a remedy “for any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of law.” *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002) (citing *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir. 2000)); *see also Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). A plaintiff must prove an underlying statutory or constitutional violation in order to prevail under 42 U.S.C. § 1983. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 330 (1986) (holding that in order to recover in a § 1983 suit, a “plaintiff must still prove a violation of the underlying constitutional right”); *Doe*, 257 F.3d at 314. In approaching the merits of a § 1983 claim, a court begins by identifying “the exact contours of the underlying right said to have been violated” and then determining “whether the plaintiff has alleged a deprivation of a constitutional right at all.” *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000) (internal quotation omitted).

At trial it was contended that Defendant Molloy used excessive force against Greco when he arrested Greco on September 18, 2000, in violation of the Fourth Amendment of the United States Constitution. The Fourth Amendment prohibits the use of excessive force during the

course of an arrest. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Orsatti v. N.J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995). “In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.” *Graham*, 490 U.S. at 394. When the alleged violation arises from an arrest, the Fourth Amendment is implicated. *Id.* at 395; *see also Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999) (noting that “excessive force in the course of an arrest is properly analyzed under the Fourth Amendment, not under substantive due process” (citing *Graham*, 490 U.S. at 393-94)). To prevail on an excessive force theory under the Fourth Amendment, a plaintiff must show that there was a seizure and that the use of force “is excessive under objective standards of reasonableness.” *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001); *see also Curley*, 298 F.3d at 279 (citing *Abraham*, 183 F.3d at 288). “A seizure occurs ‘whenever an officer restrains the freedom of a person to walk away.’” *Curley*, 298 F.3d at 279 (quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)).

At trial, the testimony established that on September 18, 2000, Officer Malloy and Officer Drury boarded the Amtrak train in question in response to a call regarding a problem with a passenger. (June 8, 2005 Tr. at 53-54; June 9, 2005 Tr. at 43-44.) When Malloy and Drury approached Greco, Molloy observed Greco lying across two seats. (June 8, 2005 Tr. at 61-62.) Molloy asked Greco to give up one seat in order “to alleviate the situation” and “have him comply with the rules and regulations of the conductor and Amtrak, and to get the train moving.” (*Id.* at 65; June 9, 2005 Tr. at 59, 65.) Greco was not cooperative. (June 8, 2005 Tr. at 68-70; June 9, 2005 Tr. at 68-69.) At one point Molloy asked Greco if he needed an ambulance, because Molloy “was using every tactic [he] could to try to voluntarily get [Greco] off the train.”

(*Id.* at 71.) After Officer Drury attempted to convince Greco to exit the train, Drury informed Greco that he was under arrest. (June 8, 2005 Tr. at 74-75; June 9, 2005 Tr. at 72, 89.) Drury physically removed Greco from his seat and, while holding Greco by his arm, walked him down the aisle of the train car. (June 8, 2005 Tr. at 76, 78-81; June 9, 2005 Tr. at 89-90.) Molloy followed behind Greco and Drury. (*Id.*) Drury and Greco exited the train first. As Molloy turned the corner of the vestibule to exit the train, both Drury and Greco were “splayed” on the train platform, with Greco on the ground and Drury on top of him. (*Id.* at 83.) Drury applied handcuffs to Greco. (*Id.* at 85; June 9, 2005 Tr. at 96.) It is evident from the testimony that Molloy did not have any significant physical contact with Greco.<sup>5</sup> There is no factual basis for the claim of excessive force against Molloy. Judgment must be entered in favor of Defendant Molloy on the excessive force claim.

Similarly, the evidence at trial does not contain any facts that support a claim of false arrest against Molloy. The Fourth Amendment prevents a police officer from arresting a citizen without probable cause. *Orsatti*, 71 F.3d at 482. A warrantless public arrest does not violate the

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<sup>5</sup> Some courts have permitted a plaintiff to establish that an officer violated § 1983 under a theory of bystander liability. Under this theory, an officer is liable if he knows that a fellow officer is violating an individual’s constitutional right, has a reasonable opportunity to prevent the harm, but chooses not to act. *See Jackson v. Mills*, No. 96-3751, 1997 WL 570905, at \*5 (E.D. Pa. Sept. 4, 1997); *Fernandors v. District of Columbia*, 382 F. Supp. 2d 63, 72 (D.D.C. 2005); *Travis v. Village of Dobbs Ferry*, 355 F. Supp. 2d 740, 752 (S.D.N.Y. 2005); *Nowell v. Acadian Ambulance Servs.*, 147 F. Supp. 2d 495, 507 (W.D. La. 2001). As an initial matter, Plaintiff obviously is not asserting this theory at this juncture. To the contrary, Plaintiff has moved for entry of judgment in favor of Defendant Molloy. Even if Plaintiff had pursued this theory, the trial record contains no support for subjecting Molloy to bystander liability. The trial testimony indicated that Molloy did not believe that Drury’s arrest of Greco on the Amtrak train involved any force. In fact, Molloy was never interviewed by the Use of Force Committee, the body at Amtrak which investigates incidents in which its officers use force. (June 8, 2005 Tr. at 28-30, 134.) Further, Molloy did not see Drury and Greco’s fall to the station platform. (*Id.* at 83.) He could not have prevented the fall because he was not in the area.

Fourth Amendment “where there is probable cause to believe that a criminal offense has been or is being committed.” *Devenpeck v. Alford*, 125 S. Ct. 588, 593 (2004). Therefore, to prevail on a § 1983 claim for false arrest, a plaintiff must establish that he was arrested without probable cause. *Santiago v. City of Vineland*, 107 F. Supp. 2d 512, 561 (D.N.J. 2000). Probable cause may only exist when there is “proof of facts and circumstances that would convince a reasonable, honest individual that the suspected person is guilty of a criminal offense.” *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993). A court must review the totality of the circumstances to assess whether an officer had probable cause to make an arrest. *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997) (citing *United States v. Glasser*, 750 F.2d 1197, 1205 (3d Cir. 1984)). In determining whether an officer had probable cause for an arrest, a court, in reviewing the totality of the circumstances, must “examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

In this case, whether Greco was falsely arrested was a factual issue for the jury to determine. However it was Officer Drury, not Officer Molloy, who decided to arrest Greco. Moreover, it was Drury not Malloy who made the arrest. (June 8, 2005 Tr. at 109; June 9, 2005 Tr. at 86.) Accordingly, judgment will be entered in favor of Defendant Molloy on the false arrest claim.<sup>6</sup>

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<sup>6</sup> We dismiss these § 1983 claims against Molloy based on insufficient evidence. We note, however, that qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Under this doctrine, “officers performing discretionary functions are ‘shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

In addition to the § 1983 claims, Plaintiff also contended that Defendant Molloy arrested Greco without probable cause and committed assault and battery on Greco in violation of New Jersey law. Under New Jersey law, a plaintiff may prevail on a false arrest claim if he demonstrates that (1) he was arrested or detained against his will; and (2) there was no proper legal authority or legal justification for the arrest or detention. *Ramirez v. United States*, 998 F. Supp. 425, 434 (D.N.J. 1999); *Megelski v. Oraboni*, 748 A.2d 1130, 1138 (N.J. Super. Ct. App. Div. 2000) (citing *Barletta v. Golden Nugget Hotel Casino*, 580 F. Supp. 614, 617 (D.N.J. 1984)). With respect to assault and battery, when effecting an arrest, “a police officer may use such force as is reasonably necessary under the circumstances.” *Mantz v. Chain*, 239 F. Supp. 2d 486, 507 (D.N.J. 2002) (citing *Hill v. Algor*, 85 F. Supp. 2d 391, 411 (D.N.J. 2000)). If the officer uses excessive force to effect the arrest, he may be liable for assault and battery. *Id*; *Hill*, 85 F. Supp. 2d at 411. As discussed above, Molloy’s physical contact with Greco was

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reasonable person would have known.” *Curley*, 298 F.3d at 277 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Courts may raise the issue of qualified immunity sua sponte. *See Delie*, 257 F.3d at 312 (3d Cir. 2001); *Graves v. City of Coeur D’Alene* 339 F.3d 828 (9th Cir. 2003); *Rolle v. Berkowitz*, No. 03-7120, 2004 WL 287678 (S.D.N.Y. Feb. 11, 2004); *Skevofilax v. Quigley*, 586 F.Supp. 532, 538 (D.N.J. 1984); *Sonoda v. Cabrera*, 255 F.3d 1035, 1039 (9th Cir. 2001); Section 1983 Litigation: Claims and Defenses § 9A.14[B] (2005).

In reviewing the merits of a claim of qualified immunity, a court must first determine whether “the facts alleged show the officer’s conduct violated a constitutional right.” *Saucier*, 533 U.S. at 201; *see also Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Donahue v. Gavin*, 280 F.3d 371, 378 (3d Cir. 2002) (explaining that a court “must ‘determine first whether the plaintiff has alleged a deprivation of a constitutional right at all’ when a government official raises qualified immunity as a defense to an action under § 1983” (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998))). If the facts, when viewed in the light most favorable to the plaintiff, do not show that the officer violated a constitutional right, then plaintiff’s § 1983 claim fails. *Curley*, 298 F.3d at 277. It appears that based upon the testimony presented at trial, Defendant Molloy would be entitled to qualified immunity. Interestingly, the answers to the Special Interrogatories submitted to the jury on the issue of qualified immunity support this conclusion.

insignificant, and he did not effect the arrest of Greco. Under the circumstances, there is no basis upon which a reasonable jury could find Molloy liable on the state law claims, and judgment will be entered in favor of Molloy on the New Jersey state law claims of false arrest and assault and battery.

2. Defendant Baldwin

Plaintiff brings a § 1983 claim against Defendant Baldwin, the conductor of the Amtrak train. Plaintiff's argues that Baldwin violated § 1983 when he provided information to Officers Drury and Molloy prior to his arrest. "Absent immunity or an adequate defense, a person who, acting under color of state law, directly and intentionally applies the means by which another is seized in violation of the Fourth Amendment can be held liable under § 1983. As a general rule, a government official's liability for causing an arrest is the same as for carrying it out." *Berg v. County of Allegheny*, 219 F.3d 261, 271-72 (3d Cir. 2000) (citing *Kilbourn v. Thompson*, 103 U.S. 168, 200 (1880)). The rule stated in *Berg* has primarily been applied to situations in which the defendant requested or issued an arrest warrant which was then used in an improvident arrest. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 344-45 n.7 (1986); *Berg*, 219 F.3d at 271-72; *Valdetarro v. Vollrath*, No. 02-2870, 2002 WL 32107615 (E.D. Pa. Dec. 24, 2002).

In the case at bar, there was no arrest warrant. In addition, there was no evidence presented at trial indicating that Baldwin had ever asked Drury and Molloy to arrest Greco. Baldwin testified that, on the date in question, a passenger had complained to him that Greco was occupying two seats on the train. Upon further investigation, Baldwin observed Greco lying across the two seats. (June 7, 2005 Tr. at 177.) He asked Greco to move his belongings and his feet off the second seat that he was occupying on the train. After Greco twice refused to move,

Baldwin informed him that if he did not comply, Baldwin would have to contact the Amtrak police. (*Id.* at 183.) When Greco failed to comply Baldwin contacted the Amtrak police. When Officers Drury and Molloy arrived at the Trenton, New Jersey station, Baldwin told them that there was a passenger on the train, who had refused on several occasions to comply with Baldwin's request that he remove his belongings and his feet from the second seat. (June 7, 2005 Tr. at 189, 205-07; June 8, 2005 Tr. at 54; June 9, 2005 Tr. at 45-46.) Although Baldwin had the authority to contact the Amtrak police, he had no authority to arrest and it was not his decision to remove Greco from the train. (June 7, 2005 Tr. at 219-20.) Those decisions were made by Drury. In reality, Baldwin was simply doing his job. If a passenger refuses to comply with a reasonable request, the conductor turns the situation over to the Amtrak police. Based on this evidence, there is no factual basis to support Plaintiff's claim against Baldwin. Judgment will be entered in favor of Defendant Baldwin on the § 1983 claim.

### **III. CONCLUSION**

The interests of justice will best be served by limiting the new trial to issues related to the liability of Defendants Drury and Amtrak as his employer. *See Cromling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 152 (3d Cir. 1964). We therefore will enter judgment in favor of Defendants Baldwin and Molloy on all claims brought against them, and the retrial of this matter will proceed against only Drury and Amtrak.

An appropriate Order follows.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANA-BORGER GRECO	:	
Administratrix of the Estate of	:	
JOSE GRECO, Deceased	:	CIVIL ACTION
	:	
v.	:	NO. 02-CV-6862
	:	
THE NATIONAL RAILROAD	:	
PASSENGER CORPORATION	:	
(AMTRAK), ET AL	:	

**ORDER**

AND NOW, this 30th day of December, 2005, upon consideration of Plaintiff's Motion For The Entry Of Judgment (Doc. No. 69), Defendants' Brief In Opposition To Plaintiff's Motion (Doc. No. 70), and Plaintiff's Reply Memorandum (Doc. No. 71), it is ORDERED that Plaintiff's Motion is DENIED. It is FURTHER ORDERED that judgment be entered in favor of Defendants Alex Baldwin and Kevin Molloy.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge